

# Tab 14.

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

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4 LIBERTY MUTUAL

5 Plaintiff

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6 VERSUS

7 CA-96-10804-DPW

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8 BLACK & DECKER

9 Defendant

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11 BEFORE THE HONORABLE DOUGLAS P. WOODLOCK

12 UNITED STATES DISTRICT COURT JUDGE

13 HEARING - BROS SITE

14 AUGUST 27, 2003

15 APPEARANCES:

16 RALPH T. LEPORE, III, ESQ. AND JANICE KELLEY  
17 ROWAN, ESQ., Holland & Knight, LLP, 10 St. James  
18 Avenue, Boston, Massachusetts 02116, on behalf  
of the Plaintiff

19 JACK R. PIROZZOLO, ESQ. AND RICHARD L. BINDER, ESQ.,  
20 Willcox, Pirozzolo & McCarthy, 50 Federal Street,  
21 Boston, Massachusetts 02110, on behalf of the  
22 Defendants

23 ALSO PRESENT: Linda Biagioni

24 Courtroom No. 1 - 3rd Floor  
1 Courthouse Way  
25 Boston, Massachusetts 02210  
10:00 A.M. - 11:30 A.M.

26 Pamela R. Owens - Official Court Reporter  
27 John Joseph Moakley District Courthouse  
28 1 Courthouse Way - Suite 3200  
29 Boston, Massachusetts 02210

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3 THE COURT: Well, just a kind of scheduling  
4 thing. We're on for Jaffrey/Cross on September 17th and  
5 then Bostick/Middleton October 3rd, is it --

6 MR. LEPORE: 8th.

7 THE COURT: 8th. Okay. What is the timing  
8 that you anticipate for Beverly to be put in a context  
9 of summary judgment?

10 MR. LEPORE: Summary judgment motions are due  
11 September 5th, next Friday; and the oppositions are due  
12 October 3, I think, four weeks after that. So, I would  
13 expect, barring any necessary replies, if there were  
14 replies, I can imagine we could do it in ten days. But  
15 probably the end of October, Judge.

16 THE COURT: Okay. So, --

17 MR. LEPORE: Is that fair, Jack, for argument  
18 on Beverly?

19 MR. PIROZZOLO: That's fine with me.

20 THE COURT: So, then, that would be the next  
21 argument, I think.

22 MR. PIROZZOLO: I thought we had --

23 THE COURT: There's a long-term exposure  
24 that's out there as well.

25 MR. PIROZZOLO: But we'll leave Cross as the

1 next time.

2 THE COURT: Yes. Cross is the 17th and then --

3 MR. PIROZZOLO: I thought we had a different  
4 one for October.

5 MR. LEPORE: Yes, Bostick/Middleton.

6 MR. PIROZZOLO: You mean next after Bostick?

7 THE COURT: Yes. Okay. So, I will try and  
8 set a date in October for that.

9 Now, there were lingering questions about  
10 discovery in Beverly. Have they been worked out?

11 MR. LEPORE: By and large, we have worked --  
12 in fact, Mr. Pirozzolo and I spoke yesterday. Over the  
13 last six weeks, they have produced a numerous amount of  
14 materials and documents, in large respect that are  
15 responsive, but have raised other questions. My  
16 preference -- and I talked to Mr. Pirozzolo last night  
17 about this -- is to defer that motion until we've had a  
18 chance to work it out over the next two weeks so that if  
19 on September 17 when we're back, we'll be able to tell  
20 you one way or the other whether there's anything  
21 remaining if that's fair, Your Honor.

22 THE COURT: That's fine with me.

23 MR. PIROZZOLO: I see no reason to involve the  
24 Court in this at this stage.

25 THE COURT: Okay. And it's not going to

1       interfere with the briefing?

2                    MR. PIROZZOLO: No.

3                    MR. LEPORE: I don't believe so. I think, as  
4 I said, the documents that have been produced over the  
5 last four to six weeks have been helpful.

6                    THE COURT: Will be adequate. Okay.

7                    Now, let me turn to the BROS and Brooks and  
8 Huth materials. Again, the issue -- and it's becoming  
9 more clear to me that the factual resolution is likely  
10 to focus to a fairly large degree on the policies that  
11 are involved and whether or not they can properly be  
12 said to be involved. But I want to skip over that for a  
13 moment. That is, I find it difficult to believe that I  
14 can grant summary judgment with respect to the policies  
15 really up to 1970, that really I'm dealing with policies  
16 from '70 to '79 that can be dealt with on a summary  
17 judgment basis.

18                   MR. PIROZZOLO: Your Honor, I believe the  
19 record shows that the policies through 1971 have no  
20 pollution exclusion.

21                   THE COURT: Well, I understand that. The  
22 problem is --

23                   MR. PIROZZOLO: The policies -- I don't think  
24 it has ever been brought specifically to the Court's  
25 attention. There is an excess policy that runs from

1 1970 through 1973 --

2 THE COURT: Right.

3 MR. PIROZZOLO: -- that has been no pollution  
4 exclusion and that also does not have provisions that  
5 the underlying policy terms are incorporated. So, there  
6 would be a right to a defense.

7 THE COURT: Let me understand about the -- I  
8 was thinking of the '69 to '70 excess policy, but '70 to  
9 '73?

10 MR. PIROZZOLO: Nothing before 1971 has --

11 THE COURT: But there is an excess policy from  
12 '70 to '73?

13 MR. PIROZZOLO: Excess policy from '70 to '73,  
14 three-year policy.

15 THE COURT: You say that hasn't been brought  
16 to my attention before?

17 MR. PIROZZOLO: Well, it's in the record, Your  
18 Honor. I mean, we haven't emphasized it. It's in the  
19 record. And it has no pollution exclusion. And I'm  
20 losing the phrase. It does not incorporate in it --  
21 follow form. It doesn't follow form. So it stands on  
22 its own. So, if there's no underlying coverage, it  
23 drops down. And we have the right under that policy to  
24 a defense regardless of any arguments about the  
25 pollution exclusion.

1                   THE COURT: Well, let me -- I simply am  
2 unfamiliar with it, so I haven't focused on it.

3                   MR. PIROZZOLO: I didn't think so. I don't  
4 think we have briefed it that way and I don't think we  
5 have previously argued it orally.

6                   THE COURT: All right.

7                   MR. LEPORE: If I may, Your Honor, --

8                   THE COURT: Right.

9                   MR. LEPORE: -- with respect to that excess  
10 policy, there is no duty to defend in any excess policy.  
11 So, regardless, the drop-down has to do with the  
12 indemnification issue. That's the purpose of excess  
13 policies is to deal with that.

14                   MR. PIROZZOLO: I don't think that's correct.  
15 When the Court reads the excess policy, it will see that  
16 there's a duty to defend.

17                   THE COURT: Well, the Court hasn't, so the  
18 Court better.

19                   MR. PIROZZOLO: And, frankly, what tipped us  
20 off on this in preparation for this hearing is to go  
21 back and study the motion for summary judgment. And  
22 Liberty Mutual's motion for summary judgment seeks a  
23 judgment through March of 1973 which is before the  
24 expiration of this excess policy. And in looking at it,  
25 why did they move just through March of 1973? We then

1 realized that the excess policy imposes a defense  
2 obligation regardless of the underlying --

3 THE COURT: Well, you know, I've tried to be  
4 fairly diligent in going through these materials. And  
5 it just didn't come out to me in this fashion. And  
6 while I am loathe to impose additional obligations of  
7 briefing and so on, I think it would be helpful to me to  
8 have some briefing on the 1970 to '73 excess policy and  
9 its implications here. But I can't talk about it  
10 because I don't know it. And you're not going to teach  
11 me enough about it --

12 MR. PIROZZOLO: Today.

13 THE COURT: -- today for me to deal with that.

14 MR. PIROZZOLO: We're happy to -- whatever the  
15 Court says, we'll abide or submit on whatever schedule  
16 the Court wants.

17 THE COURT: A couple of weeks.

18 MR. PIROZZOLO: Fine, no problem.

19 THE COURT: Two weeks to address the  
20 implications of -- the dimensions of and the  
21 implications of 1970 to '73 excess policy on this  
22 matter. And it will probably be sharpened a bit by our  
23 discussion here today.

24 MR. PIROZZOLO: Thank you, Your Honor.

25 THE COURT: But that -- putting that to one

1 side, dealing with it, I think the only thing that is  
2 available for summary judgment, although I haven't  
3 finally decided, is the policies that can provide a  
4 basis for summary judgment and the policies from '70 to  
5 '79 here. The previous policies seem to me to raise  
6 factual questions about their existence, their  
7 provisions, that sort of thing that I hope to be able to  
8 clarify for you at some point.

9                   But for purposes of discussion here today, I  
10 want to focus on really '70 to '79.

11                  Now, turning to the BROS circumstances -- and  
12 maybe I want to go back a bit on this to deal with  
13 pollution exclusion a bit more specifically with the  
14 deletion of the pollution exclusion in this context --  
15 my view of the deletion provision has come to the belief  
16 that we have to be dealing with operations in Maryland.  
17 And I have come, I think, to view the Minut-Lube, if  
18 I pronounce that correctly, case as to some degree  
19 dealing with the essential operations of the entity, a  
20 lubrication business and, consequently, distinguishable  
21 from the activities of Black & Decker that led to the  
22 potential here for exposure. And, so, I would be  
23 inclined to believe that the deletion provision is going  
24 to displace any claim after 1971 of Black & Decker for  
25 indemnification and perhaps if it hinges on that,

1       although I don't think it does, the duty to defend.  
2       Now, I'll hear some argument about that, but I'm pretty  
3       much on that ground. Mr. Pirozzolo, you may want to  
4       address the question of the deletion provision here. If  
5       it's there, you're pretty much dead in the water as to  
6       indemnification, aren't you?

7                    MR. PIROZZOLO: If I understand Your Honor's  
8       comment, first, within the four corners of the  
9       provision, as is included in the policy --

10                  THE COURT: Right.

11                  MR. PIROZZOLO: -- it says the exclusion is  
12       not applicable to operations, its disjunctive operations --

13                  THE COURT: Right.

14                  MR. PIROZZOLO: -- or occurrences in Maryland.  
15       And the facts of this case are such that Black & Decker's  
16       alleged fault or alleged action that gives rise to the  
17       claim against it arises out of its plant in Maryland and  
18       its delivering its waste to A&A Disposal in Maryland.  
19       And, therefore, I think it falls squarely within the  
20       provision that it is arising under an operation in  
21       Maryland.

22                  THE COURT: That turns on the belief that this  
23       is an occurrence in Maryland, doesn't it?

24                  MR. PIROZZOLO: There's operation or  
25       occurrence.

1                   THE COURT: It's not an operation in Maryland  
2                   unless everything you do that goes out of the state  
3                   becomes an operation in Maryland. It seems to me fairly  
4                   clear -- and in this, I'm influenced, I suppose, by the  
5                   SJC in Nashua having in mind, of course, that we're  
6                   dealing with New Hampshire law, but the reading that  
7                   they give to this provision. I have looked carefully at  
8                   Minut-Lube because I think it arguably supports  
9                   your case. But I view that as a special kind of  
10                   operation, special intensively oil discharge petroleum  
11                   discharge operation, and would distinguish it on those  
12                   grounds. But if I were to take and say whenever it  
13                   comes to it, the Maryland courts are going to say that  
14                   "we block with Nashua," doesn't that end the matter  
15                   for you? They're treating the same -- essentially the  
16                   same provision.

17                   MR. PIROZZOLO: But I don't think they would.  
18                   Because you begin with the proposition that there should  
19                   not be a pollution exclusion at all in Maryland, that  
20                   Maryland bars the pollution exclusion. Liberty Mutual  
21                   has placed into the policy a cleverly-drafted pollution  
22                   exclusion which now they argue will take it outside  
23                   -- take their policy outside the policy of Maryland. We  
24                   have a case that we cite, the Alcolac case --

25                   THE COURT: Right.

1                   MR. PIROZZOLO: -- where the operation -- the  
2 generator was in Missouri and the pollution was in  
3 Missouri. And it was held that the pollution exclusion,  
4 very similar to the one involved here, did not apply.  
5 And that was so determined by the District Court in  
6 Maryland which would presumably be closer to Maryland  
7 law than Nashua was. That's 16 F.Supp 1541.

8                   THE COURT: Well, you see, the problem I have  
9 with Alcolac is the suggestion of ambiguity that it  
10 seems to rest on. I guess it puts it at direct  
11 opposition to Nashua. I'm not sure that I think it  
12 is as well developed as Nashua. I'm not sure that I  
13 would be inclined to follow it here. Of course, it's  
14 not the definitive statement of Maryland law because  
15 it's a --

16                  MR. PIROZZOLO: With respect, I don't think  
17 either the 4th Circuit or the Court of Appeals in  
18 Maryland would follow Nashua.

19                  THE COURT: Well, that's your -- as you said,  
20 the question for me is let's assume -- as I do -- that  
21 they find that more persuasive than Alcolac, what  
22 does that do to your case?

23                  MR. PIROZZOLO: Well, we still have pre-  
24 pollution exclusion.

25                  THE COURT: For summary judgment purposes,

1 which is how I raise this by talking about the period  
2 '70 to -- we're really talking about the period '70 to  
3 '71, aren't we?

4 MR. PIROZZOLO: We would have pre-pollution  
5 exclusion activities on the site. Well, it's a little  
6 difficult because Black & Decker denies that it ever  
7 shipped material to this site.

8 THE COURT: I'll go back to that. But let me  
9 say --

10 MR. PIROZZOLO: But the allegations -- the  
11 claims would --

12 THE COURT: Let me say that I think that there  
13 is the potentiality for liability for activities on the  
14 site by Black & Decker. Whether denied or not, there  
15 is. That's a duty to defend kind of issue, but it  
16 frames it. Aren't we then talking about '70 to '71?

17 MR. PIROZZOLO: And also pre-'70.

18 THE COURT: Well, pre-'70. I've indicated my  
19 view that that's not summary judgment material because  
20 of the uncertainties in respect of whether and, if so,  
21 what dimensions there are to the policies that Liberty  
22 had -- or Black & Decker had with Liberty.

23 MR. PIROZZOLO: One other -- before I answer  
24 that question directly, I'd point out the Liller  
25 case which defines operations. That's a Maryland

1       it says -- it embraces the Webster's New International  
2       Dictionary definition of "operations" as "the whole  
3       process of planning for and operating a business or  
4       other organized unit." And in a non-environmental case,  
5       it says it is "a course or a procedure of productive or  
6       industrial activity." So that at the very least, there  
7       is a fact dispute as to whether Black & Decker engaged  
8       in operations and whether the operations of which we are  
9       concerned were conducted entirely in Maryland. So, I  
10      don't think it's -- I don't think the Court could grant  
11      summary judgment for Liberty Mutual as a matter of law.  
12      What ought to happen is the definition should be given  
13      to the jury and the jury should then determine whether  
14      or not under these circumstances these are operations in  
15      Maryland.

16                   So, for summary judgment purposes, it would  
17      probably defeat our motion for summary judgment.

18                   THE COURT: Yes.

19                   MR. PIROZZOLO: But I don't believe that it  
20      leads to granting Liberty Mutual's motion for summary  
21      judgment.

22                   THE COURT: If I accept the characterization  
23      of operations for purposes of this provision as, at a  
24      minimum, ambiguous, that's really what it comes down  
25      to, doesn't it, for that to stay alive?

1                   MR. PIROZZOLO: But at some point, the Court  
2                   will define that. But then it would be the question for  
3                   the jury to fit in the facts to see if the facts --

4                   THE COURT: Well, but let's say that I provide a  
5                   definition that effectively mimics Nashua. The only  
6                   way that you get to the jury is if you say, "No, no,  
7                   this is ambiguous." And the jury has to decide what they  
8                   meant by "operations" under these circumstances.

9                   MR. PIROZZOLO: I could see it going that way.

10                  THE COURT: All right.

11                  MR. PIROZZOLO: The more direct answer to the  
12                  Court's question is that it's all a question of which  
13                  policies are implicated and whether we would be  
14                  implicating the policies right through the '70s or just  
15                  the policies up to 1971 or, based on what I've just  
16                  alerted the Court to about the excess policies, the  
17                  policies through 1973.

18                  THE COURT: Okay. Let's just assume that  
19                  we're -- because I want to clarify for my own purposes  
20                  where the disputes are in the policies themselves  
21                  that I think are subject to summary judgment or, more  
22                  specifically, one policy that's subject to summary  
23                  judgment.

24                  We're dealing from '70 to '71. And I think  
25                  that I want to understand the view of Liberty on even

1 that thin eye of a needle, because I read Bausch & Lomb  
2 fairly broadly here and I want to understand how you  
3 think you're going to get out of it for '70 and '71.

4 MR. LEPORE: The second Bausch & Lomb, Your  
5 Honor?

6 THE COURT: Yes.

7 MR. LEPORE: The '99 decision?

8 THE COURT: Yes.

9 MR. LEPORE: I think the second Bausch & Lomb  
10 decision actually can be helpful to Liberty Mutual in  
11 the following respects, Your Honor. It addresses the  
12 situation where the Court concluded that coverage could  
13 be determined if the damage to the environment occurred  
14 after the dumping. We acknowledge that that is the  
15 issue. Ours is the reverse situation. And that is as  
16 follows, Your Honor: There is no evidence whatsoever --  
17 to the extent that there's any evidence that BROS  
18 accepted any B&D waste -- that it occurred before 1973.  
19 There is no evidence at all.

20 THE COURT: But now we're talking -- let me  
21 focus it on duty to defend.

22 MR. LEPORE: Yes.

23 THE COURT: And there, you don't get to rely  
24 upon extrinsic evidence.

25 MR. LEPORE: Let me address that in three

1 separate points, Your Honor, because -- and I'm glad  
2 that you've focused on that.

3 The duty to defend in Maryland is that you  
4 have to deal with the four corners of the complaint and  
5 the four corners of the policy.

6 THE COURT: And the insurer can adduce  
7 extrinsic evidence to support that.

8 MR. LEPORE: The insured, you mean?

9 THE COURT: The insured. Excuse me.

10 MR. LEPORE: That's right. However, there is  
11 a case that -- there are two cases, Your Honor, that  
12 have come down recently. I'm going to give you one  
13 cite. The Northern Insurance Company of New York versus  
14 Baltimore Business Communications, 2003 U.S.App. Lexis  
15 12318.

16 THE COURT: Hold on a second, 12318.

17 MR. LEPORE: Fourth Circuit, June 19th, 2003.  
18 And I'm going to just recite that and then I'll get to  
19 the second case. The Fourth Circuit pointed out that,  
20 "Significantly, Maryland recognizes two limited  
21 exceptions to the general rule against an insurer's use  
22 of extrinsic evidence. First, when the underlying tort  
23 plaintiff has amended his allegations against the  
24 insured, the insurer may utilize the amendments as  
25 extrinsic evidence. If the amended allegations no

1 longer raise a potentiality for coverage, the insurer  
2 no longer has a duty to defend."

3                   Okay. Now, that doesn't apply here, that  
4 first exception. I will acknowledge that.

5                   THE COURT: And it sounds wrong. All  
6 that's happened is that you've got a new operative  
7 document.

8                   MR. LEPORE: That is correct.

9                   THE COURT: I mean, it's not extrinsic  
10 evidence. It's simply the new -- the four corners are  
11 redefined.

12                   MR. LEPORE: Exactly. But this is where we  
13 end up going to the second exception, Your Honor. And  
14 that is in Universal Underwriters v. Lowe, 135 Md.App.  
15 122 --

16                   THE COURT: Hold on. I'm slow.

17                   MR. LEPORE: -- the dual cite -- I'm sorry,  
18 135 Md.App. 122. And the dual cite is 761, Atl.2d 997,  
19 2000.

20                   THE COURT: This is the Maryland intermediate  
21 appellate court?

22                   MR. LEPORE: Yes. That's correct. And it  
23 says, "In other words, an insurer may utilize  
24 uncontroverted extrinsic evidence from the underlying  
25 lawsuit if such evidence clearly establishes that the

1 suit's allegations are beyond the scope of coverage."

2 Now, I point these out to you because we  
3 start from the premise that we're dealing with the four  
4 corners of the so-called complaint and the four corners  
5 of the policy. Over the last couple of years, we have  
6 seen two exceptions to that. And it has to do with  
7 throughout all of our arguments over the past several  
8 months, Your Honor, having to do with understanding that  
9 the duty to defend is at a specific point in time to be  
10 determined with coverage for the overriding, underlying  
11 lawsuit to be determined at a later date, which is what  
12 the insurer is entitled to do.

13 THE COURT: Let me be sure I understand what  
14 you mean by that. I look at -- or we look at the time  
15 of the -- I won't say tender because that --

16 MR. LEPORE: Right.

17 THE COURT: -- incorporates a different  
18 concept, but more or less at the time that the insured  
19 is put on notice of the potentiality.

20 MR. LEPORE: Right.

21 THE COURT: Then your duty to defend, if it  
22 is within the potentiality, continues until there is  
23 some basis for saying there's no longer a potentiality.  
24 I'm using the language of Maryland. Is that it?

25 MR. LEPORE: Fair enough. Now let's start

1       going backwards in time. Liberty Mutual became aware  
2       of this underlying claim in March of '94. That's  
3       uncontroverted.

4                   THE COURT: Now we're just dealing with BROS.

5                   MR. LEPORE: Yes. What did they become aware  
6       of in March of '94? They were presented with a cover  
7       letter and two complaints that date back to October of  
8       '92, I believe. October, yes, of '92. Okay. Liberty  
9       didn't find out until about -- whatever, how many months  
10      that is -- 17 or 18 months after Black & Decker became  
11      aware of this. What is important to understand about  
12      what Liberty became aware of in March of '94 is that in  
13      the cover letter and in the two underlying complaints  
14      that were submitted with the cover letter was that  
15      Black & Decker was not a defendant in either of those  
16      lawsuits. That is uncontroverted.

17                  THE COURT: All right.

18                  MR. LEPORE: Okay. So the question is when  
19      Liberty Mutual became aware of this claim in '94, was  
20      that a suit?

21                  THE COURT: All right.

22                  MR. LEPORE: We all acknowledge that Maryland  
23      hasn't addressed that situation yet.

24                  THE COURT: Yes.

25                  MR. LEPORE: And the question is whether they

1 are going to follow certain case law and decide that it  
2 was a suit or whether they're going to follow other  
3 cases in the country where it wasn't a suit. All right.  
4 Our position, of course, is that it wasn't a suit. It  
5 didn't trigger anything. Now, assume for a moment that  
6 Your Honor concludes otherwise, that that letter --

7 THE COURT: What is the duty --

8 MR. LEPORE: Yes.

9 THE COURT: Do you have a duty at that point  
10 when there is uncertainty about that then to seek a  
11 declaratory judgment? That is to say, you're faced with  
12 case law around the country. You know, I suppose it's  
13 -- I keep forgetting the Maine case. But Maine goes one  
14 way and Massachusetts goes the other --

15 MR. LEPORE: That's correct.

16 THE COURT: -- on this. Do you simply take  
17 your chances?

18 MR. LEPORE: Maryland law is not decided on  
19 that. And that's a fair question to ask.

20 THE COURT: Right.

21 MR. LEPORE: And I understand where Your Honor  
22 is headed. So, let me just follow the thought process  
23 for just a moment.

24 THE COURT: Okay.

25 MR. LEPORE: Assume for a moment that Your

1 Honor decides that this letter is sufficient to  
2 transform the letter into a suit so that it's within the  
3 coverage arguably. There is no case law in Maryland  
4 that decides what a suit is. We start from that  
5 premise.

6 THE COURT: All right.

7 MR. LEPORE: There are only a few cases in the  
8 country that have decided whether a PRP letter or a DEP  
9 letter is a suit. There's only one case that I'm aware  
10 of -- and that is the Zecco/Hazen line of cases here in  
11 Massachusetts that sets out the criteria for determining  
12 whether a private party letter is a suit. This under  
13 any set of circumstances must be considered a private  
14 party letter. It is a letter from the BROS settlement  
15 committee inviting Black & Decker to participate in a  
16 settlement process.

17 THE COURT: Well, giving them an alternative,  
18 one track or the other. Do you want to be in  
19 litigation? Do you want to be in settlement?

20 MR. LEPORE: And as we know, they were never  
21 sued. In fact, your question earlier to Mr. Pirozzolo  
22 about indemnity is not particularly helpful here because  
23 there is no indemnity. All we're dealing with are  
24 defense costs.

25 THE COURT: All right.

1 MR. LEPORE: And we're only dealing with duty  
2 to defend. So, the question then becomes at the time  
3 that Liberty Mutual became aware of this in '94, what  
4 did they have in front of them? They have a letter  
5 inviting Black & Decker to participate in a settlement  
6 process. It says in it -- it does say "or the  
7 alternative is to face a lawsuit." The face -- the  
8 uncontroverted fact is that they weren't sued. Black &  
9 Decker went through the settlement process, refused to  
10 settle, and never got sued. Okay. Now, if you look  
11 at the Zecco and Hazen line of cases, they set  
12 forth the criterion for determining whether or not  
13 a PRP letter is a suit or not a suit. They talk about  
14 three different criteria: First, a failure to comply  
15 with the letter should itself somehow alter the  
16 substantiality of the insured's liability. Okay. You  
17 look at this particular letter. It doesn't do anything  
18 like that because all it does is say if you don't agree,  
19 we're going to sue you. It doesn't establish liability.

20 THE COURT: Isn't that enough?

21 MR. LEPORE: No.

25 MR. LEPORE: Which never happened.

1                   THE COURT: That's what you -- well, but never  
2                   happened is something occurs after the time at which  
3                   there is what loosely I'll call the tender.

4                   MR. LEPORE: Which I will get to in a second.  
5                   Because the 16-month delay is important, Your Honor.  
6                   It's vitally important and I'll get to that in a second.  
7                   But I need to go through the Hazen/Zecco line first.  
8                   Because I firmly believe that this was not a suit that  
9                   would have triggered any duty to defend.

10                  The second part of that is that the SJC here  
11                  has said that government letters, as opposed to private  
12                  party letters, carry much more substantial weight. The  
13                  government generally follows through on their threats.

14                  Number three, the tone of the letter is  
15                  relevant to determine whether or not it's a suit that  
16                  triggers the duty to defend. This letter, however  
17                  described, was an invitation. In fact, the word is in  
18                  there. "We invite you to participate in a settlement  
19                  process."

20                  So, we look at those three factors. Does the  
21                  failure to comply with the settlement process alter the  
22                  insured's liability? No. It doesn't do anything. If  
23                  they had complied, which they took the invitation, it  
24                  didn't do anything because nothing happened. If they  
25                  didn't comply, nothing happened because they never got

1       sued.

2                   Number two, this is plainly a private party  
3       letter.

4                   Number three, it was an invitation.

5                   So I don't think there was a suit. But here's  
6       the vitally important point. When Liberty Mutual became  
7       aware of this in March of '94, Black & Decker had  
8       already been involved in this settlement process for 18  
9       months. It is uncontroverted that during that 18-month  
10      period of time, they obtained information which  
11      established that they had no connection to the BROS  
12      site. Now, they knew that in March of '94. They didn't  
13      tell Liberty Mutual that. Now, why is that? I don't  
14      know. But why is it that they ignored their own  
15      counsel's advice to tell Liberty Mutual about the years  
16      of involvement? I don't know. I can only speculate as  
17      to that.

18                  But the bottom line is at that point when  
19       Black & Decker notified Liberty Mutual of this so-called  
20       claim and lawsuit, they had definitive uncontroverted  
21       information that they had involvement at BROS before  
22       1973. In fact, there is a letter that's in the record  
23       from Swidler & Berlin, the counsel, that as early  
24       as April 19 of 1993, they knew that there was no  
25       involvement before '73. There were letters and they

1 are all in the record.

2 THE COURT: Well, let me ask this: So that's  
3 their position.

4 MR. LEPORE: I'm sorry?

5 THE COURT: That's their position, that they  
6 have no involvement.

7 MR. LEPORE: Right.

8 THE COURT: From whose perspective do we view  
9 this? Isn't it whether or not it is possible for an  
10 alternative position to be taken?

11 ME. LEPORE: That's a very good question,  
12 except that the only opposing party arguably was the  
13 BROS settlement committee. Okay.

14 THE COURT: Not necessarily. It's tiering.  
15 And ultimately, I suppose EPA can get into it. They,  
16 for a variety of reasons, don't go down the tiers. They  
17 look to second- and third-party actions to do that. But  
18 ultimately, the obligation is to EPA -- or for the  
19 remediation is to EPA.

20 MR. LEPORE: I agree with that.

21 THE COURT: So it's attenuated, but it's still  
22 there.

23 MR. LEPORE: And, yet, there's still no  
24 evidence. No one is even alleging that B&D was at the  
25 BROS site before '73. No one. Now, let me --

1                   THE COURT: Well, but what do I -- is it Mr.  
2 Goldstein? Is that the fellow's name? I'm trying to  
3 remember who the fellow -- the son of the founder of  
4 A&A.

5                   MR. LEPORE: That's right.

6                   MR. PIROZZOLO: Before Mr. Lepore was on his  
7 feet. But the record shows that A&A picked up waste  
8 from Black & Decker all through the '60s and that the  
9 son of Mr. -- I believe it's Mr. Goldstein -- that he  
10 picked up waste at Black & Decker when he was still a  
11 teenager and puts that in the -- at least in the late  
12 '60s. And there is a document in the record. This is  
13 at Appendix R, Appendix 010, that shows on a site  
14 questionnaire that shows that Black & Decker waste --  
15 I'm sorry -- that A&A waste went to the BROS site from  
16 1964 through 1979. Their record -- the extrinsic  
17 evidence is abundant except there is the possibility of  
18 a claim that Black & Decker waste went to the BROS site.  
19 Of course, Black & Decker has maintained right along  
20 that none of it went to the BROS site.

21                   THE COURT: But let me just pause for a moment  
22 to focus on this. So we're back to there's somebody out  
23 there who says that it did. Black & Decker says that  
24 it didn't. Well, you know, I look --

25                   MR. LEPORE: But that's not true, Your Honor.

1 That's a misstatement of the record. The record  
2 reflects that it is possible that A&A picked up waste  
3 from B&D. Okay. Goldstein said that, but he doesn't  
4 remember specifically. But there's no connection  
5 between A&A picking up the waste and bringing it to  
6 BROS. There is evidence that at that period of time,  
7 A&A brought that particular waste to Burke's. There is  
8 no connection between A&A picking up B&D waste and  
9 bringing it to BROS until March of 1973. That is  
10 uncontroverted. There is nothing in the record,  
11 notwithstanding everything that they have done to create  
12 an issue of fact here, there is nothing to make that  
13 connection before March of 1973. And I say that  
14 emphatically because, Your Honor, there is information  
15 in the record. There is a letter that I just referred  
16 to, April 29th of 1993. There's a September 20th, 1993,  
17 letter from Swidler & Berlin to Ms. Biagioni.

18 THE COURT: Well, but, see, let me just stop  
19 on that. That there are internal discussions in which  
20 they say that they did not -- that their waste never  
21 made its way to BROS, it seems to me, is interesting,  
22 but not immediately relevant on the question of duty to  
23 defend.

24 The more fundamental question is whether or  
25 not a finder -- there is a potentiality that a finder of

1 evidence. Are you permitted to do that? I don't think  
2 so.

3 THE COURT: Why not?

4 MR. LEPORE: And I'll tell you why. I think  
5 what you're entitled to do -- and follow me out, hear me  
6 out. If you're going to look back in 1994 as to what  
7 Black & Decker knew and include extrinsic evidence at  
8 the time that they had a letter inviting them to  
9 participate and two complaints of which they were  
10 neither a defendant in. What extrinsic evidence are you  
11 permitted to look at? Are you only permitted to look at  
12 the stuff that's helpful to them as opposed to all of  
13 the stuff that they knew at the time, including a letter  
14 from the BROS settlement committee setting forth the  
15 parameters of the years of involvemenet?

16 THE COURT: Well, I think I have to look at  
17 all that stuff.

18 MR. LEPORE: That's my point. And if you do  
19 that --

20 THE COURT: But let me just step back for a  
21 minute.

22 MR. LEPORE: Okay.

23 THE COURT: But if there is enough in that  
24 to create a question of fact, then the existence of  
25 contrary positions is interesting, but not compelling on